No. 76-1696

In the Supreme Court of the United States

OCTOBER TERM, 1977

DAVID C. HAKIM, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

DANIEL M. FRIEDMAN,
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Petitioner brought this suit to enjoin the operation of several provisions of the Internal Revenue Code (26 U.S.C.) which he contends discriminate against lower and middle-income taxpayers by according preferential tax treatment to "wealthy individuals and corporations"[1] (Complaint, p. 2).

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[1]The provisions challenged by petitioner are: Section 46 (investment credit for specified types of business property), Sections 611 and 613 (depletion allowance for mines, oil and gas wells, other natural deposits and timber), Section 995 (tax treatment of qualifying "domestic international sales corporations"), Section 1014 ("stepped up" basis for determining gain or loss on the disposition of property acquired from a decedent) and Sections 1201 and 1202 (gains upon the sale or exchange of capital assets).

Since the filing of petitioner's complaint, Congress has added Section 1023 to the Code, which for the most part eliminates the "stepped-up" basis rules of Section 1014 about which petitioner complains. See Section 2005(a)(2), Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520.

The district court refused to convene a three-judge court under former 28 U.S.C. 2282 and dismissed the complaint for lack of standing and because the complaint failed, in any event, to raise a substantial constitutional claim warranting review by a three-judge court (Pet. App. 25).

Petitioner sought review in the court of appeals of the district court's dismissal of his suit. While the appeal was pending, petitioner filed a petition in this Court for certiorari before judgment by the court of appeals. This Court denied certiorari (429 U.S. 930). The court of appeals thereafter affirmed, concluding that petitioner's various arguments were "frivolous and completely without merit" (Pet. App. 24).

1. The courts below correctly held that petitioner lacked standing to bring this suit to enjoin the operation of several provisions of the Internal Revenue Code. As the Court observed in *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, "when a plaintiff's standing is brought into issue the relevant inquiry is whether * * * the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation." Accord: *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 218.

Here, the "kind of direct injury required for standing" is missing because petitioner has no "personal stake in the outcome" of the issues he seeks to litigate that would differentiate him from other members of the public. *United States* v. *Richardson*, 418 U.S. 166, 172-173, 176-177; *Simon* v. *Eastern Ky. Welfare Rights Org.*, *supra*, 426 U.S. at 38. Instead, petitioner seeks to challenge the constitutionality of the various Code sections referred to in his complaint solely in his capacity as an asserted "member of the middle class" (Pet. App. 2 n. 2), on the ground that the

challenged provisions give more affluent taxpayers preferential tax treatment to the alleged detriment of the middle class.

But there is no necessary connection between one taxpayer's present or potential tax liability and the tax treatment accorded others. As this Court held more than 50 years ago in *Massachusetts* v. *Mellon*, 262 U.S. 447, 486-489, and reaffirmed in *United States* v. *Richardson*, *supra*, 418 U.S. at 171-180, a plaintiff cannot use his status as a taxpayer as a basis for requiring a federal court to hear what are essentially his " 'generalized grievances about the conduct of government.' " *United States* v. *Richardson*, *supra*, 418 U.S. at 173, quoting from *Flast* v. *Cohen*, 392 U.S. 83, 106. Petitioner's interest in this lawsuit is "plainly undifferentiated and 'common to all members of the public' "— a circumstance which in itself strongly suggests that "the subject matter * * * [has been] committed to Congress, and ultimately to the political process." *United States* v. *Richardson*, *supra*, 418 U.S. at 176-177, 179.

2. The courts below also correctly held that petitioner failed to raise a "substantial" constitutional question that would have warranted convening a three-judge court under former 28 U.S.C. 2282. In petitioner's view, the progressive rate structure of the federal income tax is a doctrine of constitutional significance. Starting from this premise, petitioner argues (Pet. 19) that the various Code provisions challenged by him violate the General Welfare Clause of Article I, Section 8 of the Constitution as well as what he has termed (*ibid.*) the "inherent equal protection limitation" of the Due Process Clause of the Fifth Amendment. Thus, petitioner contends that wealthy individuals should be required, as a constitutional matter, to pay progressively greater taxes than others, and that any provision that may reduce their total tax liability is unconstitutional.

This Court, however, has always regarded the progressive tax-rate structure of the tax statutes as involving essentially a legislative rather than a constitutional matter. *Knowlton* v. *Moore*, 178 U.S. 41, 109; *Brushaber* v. *Union Pac. R. R.*, 240 U.S. 1. Moreover, it is also well settled that Congress possesses substantial latitude in making reasonable distinctions between differently situated taxpayers. *Brushaber* v. *Union Pac. R. R.*, *supra*, 240 U.S. at 24-25; *Barclay & Co.* v. *Edwards*, 267 U.S. 442, 450-451; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 583-585. "[L]egislative classification[s]" such as those involved in this case "will not be set aside if any state of facts rationally justifying • • • [them] is demonstrated to or perceived by the courts." *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6. In short, Congress does not violate due process or equal protection of the law when it exercises its legislative judgment to "tax different types of taxpayers differently."[2] See *Puget Sound Co.* v. *Seattle*, 291 U.S. 619, 624, 625; *Steward Machine Co.* v. *Davis*, *supra*, 301 U.S. at 585.

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[2]There is a sufficient justification for all of the provisions here in question. The investment credit (Section 46) was adopted not only with the hope of stimulating the "level of economic activity" of the country but also with the expectation that this would "in turn add to Federal Revenues" by enlarging the nation's tax base. H.R. Rep. No. 1447, 87th Cong., 2d Sess. 7 (1962). Indeed, contrary to petitioner's assertion that Section 46 discriminates in favor of the wealthy, Congress designed the investment credit with the idea that it would be "particularly important for new and smaller firms which do not have ready access to the capital markets." S. Rep. No. 1881, 87th Cong., 2d Sess. 11 (1962).

The percentage depletion allowance (Sections 611 and 613) serves both "to permit a recoupment of the owner's capital investment in the minerals" (*Commissioner* v. *Southwest Expl. Co.*, 350 U.S. 308, 312), and to "stimulate prospecting and exploration" for the natural resources necessary for maintaining the nation's economy. S. Rep. No. 617, 65th Cong., 3d Sess. 6, 8 (1918). Likewise, "domestic international sales corporations" are given special tax treatment under Sections 991 through 997 by providing "tax incentives for U.S. firms to increase their exports" and eliminating the disparity in tax treatment between United States companies engaging in export business through domestic corporations, and those engaging in such business through foreign subsidiaries. H.R. Rep. No. 92-533, 92d Cong., 1st Sess. 58 (1971).

Petitioner also objects to Section 1014, which generally provided that a taxpayer's basis in property acquired from a decedent is its fair market value at the date of a decedent's death (or alternate estate tax valuation date) rather than the cost of such property to the decedent. But as we have noted (p. 1, note 1), that provision has been substantially superseded by new Section 1023 which applies to decedents dying after December 31, 1976. At all events, the Court has recognized that "Congress unquestionably had power and reasonably might fix value at the time title passed from the decedent as the basis for determining gain or loss upon sale of the right or of the property • • •." *Brewster* v. *Gage*, 280 U.S. 327, 334.

Finally, petitioner complains that the capital gains provisions of the Code (Sections 1201 and 1202) are discriminatory. But the preference for capital gains ameliorates the hardship of imposing a one-time tax on the entire gain realized by taxpayer when, in all probability, any "appreciation in value accrued over a substantial period of time." *Commissioner* v. *Gillette Motor Co.*, 364 U.S. 130, 134; *Commissioner* v. *Brown*, 380 U.S. 563, 572. See also H.R. Rep. No. 350, 67th Cong., 1st Sess. 10-11 (1921).

Finally, the General Welfare Clause was intended to expand and not limit Congress' power of taxation. *United States* v. *Butler*, 297 U.S. 1, 65-66. Thus, "whether a tax serves • • • [the general welfare] • • • is a practical question addressed to the law-making department"—not the courts. *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 313. See also *Helvering* v. *Davis*, 301 U.S. 619, 640-641.

In light of the above principles, petitioner failed to raise any "substantial" constitutional question. The district court therefore properly dismissed his complaint without convening a statutory three-judge court. See *Ex parte Poresky*, 290 U.S. 30, 31-32; *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715; *Swift & Co.* v. *Wickham*, 382 U.S. 111, 115.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

JULY 1977.

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*The Solicitor General is disqualified in this case.